No. 80204-1

SUPREME COURT OF THE STATE
OF WASHINGTON

ARTHUR T. LANE, et al., individually and on behalf of the class of all persons similarly situated, Respondents,

vs.

THE CITY OF SEATTLE, Respondent,

vs.

THE CITY OF SHORELINE, KING COUNTY, KING COUNTY FIRE DISTRICT NO. 2, KING COUNTY FIRE DISTRICT NO. 4 (a.k.a. Shoreline Fire Department), NORTH HIGHLINE FIRE DISTRICT NO. 16 (a.k.a. Northshore Fire Department), and KING COUNTY FIRE DISTRICT NO. 20, Respondents,

and

THE CITY OF BURIEN and THE CITY OF LAKE FOREST PARK, Appellants.

BRIEF OF APPELLANT CITY OF LAKE FOREST PARK

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2. The trial court's ruling that a municipal utility's incorporation of fire hydrant maintenance costs into the general rate structure constitutes an unlawful tax on ratepayers is erroneous.

3. The trial court's ruling that the Cities of Burien and Lake Forest Park must reimburse the City of Seattle for the costs of maintaining fire hydrants located within the Cities of Burien and Lake Forest Park is erroneous.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Whether recovering the cost of fire hydrants through rates is a proprietary power implicit in the delegation of proprietary powers to operate a municipal waterworks?

2. Whether the incorporation of the costs associated with operating and maintaining fire hydrants into the general rate structure constitutes the imposition of a tax upon ratepayers?

3. Whether the City of Seattle stated a cause of action against the Cities Burien and Lake Forest Park?

III. STATEMENT OF THE CASE

The City of Lake Forest Park incorporates by reference the "STATEMENT OF THE CASE" as set forth in the brief of Co-Appellant, City of Burien, with the addition of the following facts specific to Lake Forest Park.

The City of Lake Forest Park incorporated in 1960. CP 3484. At that time it was bounded on the east by Lake Washington and on the south, north and west by unincorporated King County. CP 3484. Fire protection services were provided by a fire protection district, a special purpose municipal corporation governed by an elected board of commissioners. CP 3484. Lake Forest Park does not and never has had a Fire Department, relying instead on its local Fire District, King County Fire District No. 16. CP 3484.

Lake Forest Park received and still receives water service and fire flow from the Lake Forest Park Water District, also a special purpose municipal corporation governed by an elected board of commissioners. CP 3484. A portion of the area south of Lake Forest

Park received water supply and fire flow from the City of Seattle's water utility (now known as Seattle Public Utilities). CP 3484. When Lake Forest Park annexed the area south of its original boundary in the late 90's, Seattle continued to provide water supply. CP 3484. Lake Forest Park did not and does not require a franchise from Seattle. CP 3484. It has no contract with Seattle for water supply or fire protection services. CP 3484. Lake Forest Park has never received any revenue from Seattle's water utility, it has never taxed that utility, and it has not required Seattle to continue to provide service to any area within the city. CP 3484.

IV. ARGUMENT

This case presents the issue of whether the expenses incurred by a municipality's proprietary water business's for installing and maintaining fire hydrants that are required by State regulations to maintain its State operating permit are a cost of doing business that can be included in the rates for water sold.

Seattle Public Utilities ("SPU") owns and operates a water system to serve its customers with potable water. As required by state regulation, Seattle's infrastructure provides fire suppression capability. SPU operates

this system within and without Seattle's corporate limits. SPU's water system costs, including the cost of infrastructure that provides fire suppression capability, have, until recently, been included in the water service rate base and paid by Seattle's customers according to water consumed.

Recently, Seattle started paying these infrastructure costs from its general fund. Seattle ratepayers commenced this class action lawsuit for a refund of that portion of the water rate attributable to fire suppression infrastructure. Seattle brought a third-party complaint seeking reimbursement from Burien, and Lake Forest Park, among others, of "their share" of any money Seattle had to refund, even though neither city is a customer of Seattle or benefits from the fire protection it provides.

A. Standard of Review.

On appeal from a summary judgment order, the appellate court engages in the same inquiry as the trial court. *Key Tronic Corp. v. Aetna (CIGNA) Fire Underwriters Ins. Co.*, 623-24, 881 P.2d 201 (1994). The issues in this case pertain to constitutional limitations and statutory authority, and so are issues of law to be determined de novo by

this court. *Our Lady of Lourdes Hosp. v. Franklin County*, 443, 842 P.2d 956 (1993); *Okeson v. City of Seattle*, 150 Wn.2d 540, 549, 78 P.3d 1279 (2003).

B. Assignment of Error No. 1.

Through the exercise of its proprietary power, Seattle supplies water for the comfort and use of its customers, and implicit in that proprietary power is authority to include in the cost of that water all cost it incurs to comply with regulations, such as the state requirement that it must provide fire flow and fire hydrants.

Generally, a municipality acts in either a governmental or proprietary capacity. *Branson v. Port of Seattle*, 152 Wn.2d 862, 870, 101 P.3d 67 (2004).[1] A city operating a water utility acts in a proprietary capacity. *Russell v. Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951). When the legislature authorizes a municipality to engage in a business, the municipality may exercise its business powers in very much the same way as a private individual. *City of Tacoma v. Taxpayers of Tacoma*, 108 Wn.2d 679, 694, 743 P.2d 793 (1987);

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[1] Municipal powers are construed differently according to whether the power exercised is governmental or proprietary in nature. *City of Tacoma v. Taxpayers of Tacoma,* 108 Wn.2d 679, 743 P.2d 793 (1987). When a governmental function is involved, less opportunity exists for invoking the doctrines of liberal construction and of implied powers. *Id.* at 694. However, when the legislature authorizes a municipality to engage in a business, it may exercise its business powers in very much the same way as a private individual. *Id.*

Okeson v. City of Seattle, 150 Wn.2d 540, 549, 78 P.3d 1279 (2003) (*Okeson I*). Seattle's authority to operate a water utility sounds in RCW 35.92.010, which provides in part:

> A city... may ... maintain and operate waterworks, **including fire hydrants as an integral utility service incorporated within general rates**, within or without its limits, for the purpose of furnishing the city and its inhabitants, and any other persons, with an ample supply of water for all purposes, public and private, ...

(emphasis added).

RCW 35.92.010 authorizes SPU to incorporate into rates the costs associated with fire hydrants as part of the utility's services. However, even without that explicit authority, *City of Tacoma v. Taxpayers of Tacoma*, *supra*, holds that Seattle may exercise its business powers in much the same manner as other businesses. All businesses recover the cost incurred to comply with regulations or in the price of their products or services. Seattle has not made a voluntary governmental decision to provide hydrants; it is required by the state to provide them. Unlike streetlights, the operation and maintenance of mains and fire hydrants, including fire flow, is required by state regulation. Water utilities must comply with regulations that require minimum standards of fire flow, WAC 246-293-640, and they must

install fire hydrants at intervals of at least every 900 feet. WAC 246-293-650.

The decision to install hydrants was not a voluntary, discretionary decision of a government. Seattle installs, operates, and maintains hydrants because it is required to do so. The cost of hydrants is a cost of doing business for Seattle's water utility no different than any other cost of doing business; e.g., the cost of the state utility tax (Chapter 82.16 RCW); the cost of the state workmen's compensation program (Title 51 RCW); the cost of the state's unemployment compensation program (Title 50 RCW); the cost of the city's utility tax; or the numerous other regulatory costs incurred to protect the environment and the public's health and safety. All of these costs are recovered by business in the price for products or services. Moreover, Seattle is required to recover all of these costs as costs required to provide the service. *See* RCW 35.92.010 ("No rate shall be charged that is less then the cost of the water and service to the class of customers served.").

A fatal flaw in *Okeson I* was that the customer was not paying for a commodity supplied for his or her "comfort and use." Furthermore, the customer could not control the use of streetlights. Neither is true

here. The commodity cost of water is not a tax "because the 'consumer pays for a commodity which is furnished for his comfort and use.'" *Okeson I*, 150 Wn.2d at 540, (*quoting Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909)).

The customer is paying for a commodity (water) that the customer requested, and that is delivered to the customer's door-step. That water is solely for the customer's "comfort and use." The customer can control the use of the water and pays only for what the customer uses. And unlike *Okeson I* where the cost of streetlights was not a cost of bringing electricity to the customer, the price of Seattle's water that the customer uses includes those expenses, such as fire suppression and hydrants, that Seattle must pay to lawfully provide the water to the customer.

Recently, in *Okeson v. City of Seattle*, 159 Wn.2d 436, 150 P.3d. 556 (2007) (*Okeson II)* this court reiterated the need for a relationship between commodity use (electricity/water) and the city program. *Id.* at 449. In this case, however, there is no "city program." Seattle is merely complying with one of a number of regulatory requirements so that it can operate the business that the legislature authorized.

Seattle is specifically authorized to sell water; and according to this court it has the powers a private individual undertaking the same activity would have. Implicit in the authority to run a business is the authority to pay the costs of doing business and price those costs into the product sold. According to *Taxpayers of Tacoma*, *supra*, Seattle exercises implied powers if (1) it is exercising its proprietary powers (operating a water utility is an exercise of proprietary power); and (2) its act is within the purpose and object of the enabling statute (failure to pay the lawful cost of doing business must result in failure of the business and therefore such payments must be within the purpose and object of the statute); and (3) the act is not contrary to statute or the constitution (Seattle is statutorily required to recover its costs, *See* RCW 35.92.010 and the constitution does not prohibit including the cost of doing business in rates); and (4) the acts are not arbitrary, capricious, or unreasonable (paying legitimate business costs and recovering them in the cost of water sold passes this test). *Taxpayers of Tacoma*, 108 Wn.2d at 693-96.

Respondents are pursuing sound legal principles enunciated by this court to absurd conclusions. Surely, the heights of irony will be

scaled if SPU can purchase art for its facilities and recover the cost in rates, *Okeson II*, at 451, but cannot recover the cost of complying with lawful regulations.

C. Assignment of Error No. 2.

The recovery of the cost of fire hydrants through water rates for water sold does not constitute the imposition of a tax upon ratepayers.

The commodity cost of water is not a tax "because the 'consumer pays for a commodity which is furnished for his comfort and use.'" *Okeson I*, 150 Wn.2d at 540, (*quoting Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909)). "[A] tax is an enforced contribution of money, assessed or charged by authority of sovereign government for the benefit of the state or the legal taxing authorities. It is not a debt or contract in the ordinary sense, but it is an exaction in the strictest sense of the word." *State Ex Rel Seattle v. Dept. P.U.*, 33 Wn.2d 896, 902, 207 P.2d 712 (1949). Taxes are imposed to raise money for the public treasury. *Okeson I*, 150 Wn.2d at 551. A local government is powerless to impose taxes without statutory or constitutional authority. *Id.* Charges imposed for purposes other than raising money for the public treasury, such as for the regulation of an

activity, are not taxes and are not subject to constitutional taxation constraints. *Id.* Where the charge is related to a direct benefit or service, it is generally not considered a tax or assessment. *Id.* at 551-52. A local government may impose a fee under its general police power. *Id.*

To determine whether that portion of the water commodity charges at issue involve the imposition of a tax or a regulatory fee, the court employs a three-part test. *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995); *Okeson I, supra.*

First, is the purpose of the charge is to raise revenue for general governmental purposes or to regulate the service for which the cost is imposed? *Okeson I*, 150 Wn.2d at 552-53. "What is important is the purpose behind the money raised--a tax raises revenue for the general public welfare, while a regulatory fee raises money to pay for or regulate the service that those who pay will enjoy (or to pay for or regulate the burden those who pay have created)." *Id.*

Unlike streetlights, the cost of operating and maintaining fire hydrants is regulatory. Water utilities must comply with state regulations regarding fire hydrant construction, installation, maintenance, and fire flow. *See*, WAC 246-293-640 (providing for minimum standards for

fire flow); WAC 246-293-650 (establishing minimum standards for fire hydrant installation and maintenance).

The cost of operating and maintaining fire hydrants is not the result of a city governmental program; and that portion of the water rate imposed to recover those costs does not raise revenue for a Seattle governmental program. Instead, the cost is incurred to respond to regulatory requirements of the State that are imposed to benefit water system customers. The cost of legally required workers' compensation and unemployment benefits that SPU provides its employees are properly incorporated into rates as a normal and incidental cost of doing business. Like any other regulatory cost, the cost of hydrants is a cost of doing business, which SPU must recover through rates. *See* RCW 35.92.010.

Second, is the revenue allocated for the authorized regulatory purpose? *Okeson I*, 150 Wn.2d at 553. The water rates imposed on water sold to pay for Seattle's water business, including provision of fire hydrants, are used for that purpose only. No one argues that Seattle water rates are used for anything other than running the water business; and, Seattle has not diverted this cost from the historical source of

payment, the general fund, and imposed it on the utility like it did in *Okeson I*.

Third, is there a "direct relationship" between the fee charged and either a service received by the fee payers or a burden to which they contribute? *Okeson I*, 150 Wn.2d at 553-54.

The charge need not be individualized according to the exact benefit accruing to, or burden produced by, the fee payer. *Id.* at 554. Instead, "only a practical basis for the rates is required, not mathematical precision." *Id.* Concerning water, however, the charge closely approximates the benefit received. Each customer is charged according to water used. In this respect the charge does not resemble a tax, which is "an extraction of costs without mutual benefit for the parties." *Willman v. WUTC,* 154 Wn.2d 809, 117, P.3d 343 (2005). Here, the customer requested and received water. The basis of the bargain was water in exchange for the cost to the utility of providing that water. That cost includes, among other things, taxes and expenses related to compliance with state regulation.

Moreover, the cost of installing mains and hydrants capable of supplying water for emergency fire suppression and the cost of

maintaining those mains and hydrants in a condition to supply water on an emergency basis are directly related to the service provided: water supply for emergency fire suppression. Proper fire hydrant maintenance enhances fire protection services, reduces fire insurance premiums, and contributes to the overall operation and maintenance of the water system.

Fire hydrants are plumbing fixtures that enable SPU to supply water to the customer for emergency use. Fire hydrants benefit the properties adjacent to them. The cost of providing this benefit is incurred by those who enjoy it; that is, those who are supplied with water. Unlike *Okeson I*, where quantifying a customer's use of street lighting service was not possible, here the customer pays only for the cost of the water the customer uses, not for an undefined, unquantifiable public benefit.

Compliance with the regulatory requirements imposed under Chapter 246-293 WAC directly enhances the quality of water-related services received by SPU ratepayers. It assures a water supply for emergency fire fighting. In addition to increased fire protection, proximity to well-maintained and reliable fire hydrants and fire flow also directly benefits SPU ratepayers by reducing their fire insurance

premiums. CP 1534-57 Thus, the cost recovered for hydrants bears a "direct relationship" between the fee charged and the service received by SPU customers. *See Okeson I*, 150 Wn.2d at 553 ("a regulatory fee raises money to pay for or regulate the service that those who pay will enjoy....").

According to the three-part *Covell* analysis, the incorporation of fire hydrant operation and maintenance costs as normal part of the utility's services and general rate structure, constitutes the imposition of a permissible fee, not a tax.

D. Assignment of Error No. 3.

The City of Seattle failed to state a cause of action upon which relief can be granted.

SPU claims the third party defendants are liable for a portion of the cost of maintaining SPU fire hydrants. Specifically, Seattle alleged:

> Third-party plaintiff The City of Seattle ("the City" or "Seattle) is ' a first-class charter city existing under the laws of Washington. It is located in King County, Washington. Seattle owns and operates Seattle Public Utilities ("SPU") as a proprietary public utility. SPU provides water and other utility services to residents of Seattle, third-party defendant cities, unincorporated areas of King County, and other jurisdictions not relevant to this action. Each jurisdiction that is a party to this third-party complaint has fire hydrant services provided by SPU within some part of that jurisdiction. SPU provides fie hydrant service within Seattle.

CP 686 (emphasis added).

With respect to each city and King County, Seattle also alleged that certain portions of the named third-party defendants recieved fire hydrant service through SPU. CP686-87. Seattle further alleges in its third-party complaint:

> 11. If plaintiffs prevail in their claim that the expenses of fire hydrants should be paid by those providing governmental services, rather than by retail water rate payers, then the City of Seattle will be required to fund all expenses of SPU fire hydrants in Seattle from the general
> fund.
>
> 12. A portion of the expenses of SPU fire hydrants, however, is attributable to services provided in the jurisdictions of third-party defendants.
>
> 13. Since January 1 , 2005 , expenses of fire hydrants within the City of Seattle have been paid by the Seattle general fund rather than by water ratepayers.
>
> 14. If Seattle is liable to plaintiffs for fire hydrant expenses paid by water ratepayers between March 1 2002, and January 1, 2005, then third party defendants are liable to Seattle for their appropriate shares of those expenses.
>
> 15. If fire hydrant expenses are a general government service to be paid only by tax supported funds rather than by water ratepayers, then Seattle is entitled to payment from January 2005, forward from third-party defendants for their appropriate shares of the expenses of SPU fire hydrants in their respective jurisdictions.

16. Seattle has calculated the rates for fire hydrant services provided to third-party defendants beginning January 1, 2005 and has provided these calculations to third-party defendants. Those rates are set fort in Exhibit D.

17. None of the third-party defendants has to date agreed to pay these charges for fire hydrant services.

CP 687-88 (Emphasis added.)

In sum Seattle alleged nothing more than it provides service in third-party defendants' jurisdictions, that a portion of that service is funded by Seattle's general fund, and that some of the responsibility for payment should be shifted to the general funds of third-party defendants. Seattle fails to allege a basis to establish that third-party defendants have any legal obligation to make that payment.

To recover, Seattle must prove that one or more of the third party defendants are in some way responsible for those costs. Seattle has not alleged a legal theory on which a court can grant recovery. Seattle has not and cannot allege that it shares with third—party defendants any of the revenue earned within their corporate boundaries. Seattle has not and cannot allege that any third-party defendants taxed any of the revenues earned by Seattle within their corporate boundaries or that they receive any benefit from those revenues.

Seattle has not alleged, nor can it prove a contract with any third party defendant related to its water system, fire hydrants or fire protection. While SPU may enter into contracts (*see* RCW 35.91.020), mutual assent is a required element.

> Mutual assent is required for the formation of a valid contract. 'It is essential to the formation of a contract that the parties manifest to each other their mutual assent to the same bargain at the same time. Mutual assent generally takes the form of an offer and an acceptance.'

Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima, 122 Wn.2d 371, 388, 858 P.2d 245 (1993).

Here, neither Burien nor Lake Forest Park assented to pay the costs of fire hydrant services. CP 3483-85, CP 1480-1515, CP 1466-79, and CP 821-25. Neither Burien nor Lake Forest Park has any contract with SPU obligating them to pay. *Id.*

Seattle cannot recover against Lake Forest Park on a theory of contract.

Lake Forest Park is not a ratepayer of Seattle. Regardless, the Court ruled that SPU was acting in a governmental function, and that SPU's practice of passing the costs of maintaining its fire hydrants along to its ratepayers constituted a tax, rather than a lawful regulatory fee.

CP 3157-77. Since Seattle lacks express statutory or constitutional authority to impose such a tax on its ratepayers, the tax was declared illegal by the Court. *Id.*

Apparently, Seattle proceeded on the theory that if provision of fire hydrants and fire protection is a governmental function, then the local governments in the area served should bear the cost of that service in their jurisdiction, regardless of whether they are in the business of water supply. The third-party defendants are aware of no legal authority – statutory or common law – supportive of that position. In fact, Seattle is asking the court to do what it cannot; that is, tax another municipality.

As with its ratepayers, the law governing a municipality's taxing authority requires a similar result with respect to Seattle's efforts to recover a portion of its fire hydrant maintenance costs from other municipalities. Article VII, section 9 and article XI, section 12 of the Washington State Constitution permit the legislature to grant municipal authorities the power to levy and collect taxes for local purposes. CONST. Art. VII, § 9; art. XI, § 12; *King County v. City of Algona*, 101 Wn.2d 789, 791, 681 P.2d 1281 (1984). However, these constitutional provisions are not self-executing. *Algona*, 101 Wn.2d at

791; *Carkonen v. Williams*, 76 Wn.2d 617, 627, 458 P.2d 280 (1969). Accordingly, **municipalities must have express authority, either constitutional or legislative, to levy taxes**. *Algona*, 101 Wn.2d at 791; *Citizens for Financially Responsible Gov't v. City of Spokane*, 99 Wn.2d 339, 342, 662 P.2d 845 (1983) (emphasis added).[1]

SPU serves customers located within the corporate boundaries of Lake Forest Park. Allowing SPU to enforce the recovery of the cost of fire hydrant maintenance would amount to an imposition of an extra-territorial tax. But Seattle has no authority to impose extra-territorial taxes. Neither the constitution nor the legislature has expressly authorized Seattle to tax Lake Forest Park for anything, let alone the costs of maintaining SPU fire hydrants. Moreover, the Seattle City Council has not adopted an ordinance purporting to tax the suburban cities. Instead, SPU simply billed Lake Forest Park for these costs, and it is asking the court to enforce those billings despite the lack of any contract, despite the court's ruling that collecting these costs from

[1] The police powers granted to local governments by article XI, section 11 of the Washington State Constitution do not include the power to tax. CONST. art. XI, § 11; *Covell v. City of Seattle*, 127 Wn.2d 874, 879, 905 P.2d 324 (1995); *Margola Assocs. v. City of Seattle*, 121 Wn.2d 625, 634, 854 P.2d 23 (1993); *Hillis Homes, Inc. v. Snohomish County*, 97 Wn.2d 804, 809, 650 P.2d 193 (1982) (*Hillis Homes* I).

customers is an unlawful tax, and despite the lack of any legislative authority to impose a tax on another municipal corporation to recover those costs. In effect, Seattle is asking the court to impose a tax on Lake Forest Park, a power the court does not have.

Based on the forgoing, Seattle has failed to state a claim against the third party defendants and this action should be dismissed.

V. CONCLUSION

Seattle sells water under authority of state law. It includes in the cost of water sold amounts expended to meet regulatory requirements. Seattle, like any business owner, must recover these costs to continue to operate, and the delegation of proprietary powers implicitly includes the authority to recover the cost of doing business.

These are costs of operating a service requested by the customer and paid for according to the customer's consumption of water. The water they pay for provide for the customer's comfort and use.

For all the foregoing reasons, Appellant, City of Lake Forest Park, request the Court for an order reversing the judgment of the Trial Court in its entirety, or in the alternative, for an order reversing the judgment against the City of Lake Forest Park, as Third-Party Defendant, in favor of the City of Seattle, Third-Party Plaintiff.

Respectfully submitted this 17th day of September, 2007.

INSLEE, BEST, DOEZIE & RYDER, P.S.

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